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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY LEE CASWELL,

Defendant and Appellant.

A125258

(Lake County
Super. Ct. No. CR034431)

Anthony Lee Caswell appeals his sentence on the grounds that he was improperly assessed penalties enacted after he committed his crime, in violation of the ex post facto clauses of the federal and state constitutions. He further contends that he is entitled to additional presentence custody conduct credits under 2009 amendments to Penal Code section 4019, which he argues must be applied retroactively. The People concede the first error but dispute the second. We agree on both counts and remand for correction of his sentence.

I. BACKGROUND

On May 21, 2003, a minor told law enforcement officials that Anthony Lee Caswell had given her and a minor friend beer and marijuana, that he had taken them to Humboldt County to buy marijuana, and that he had them help him process the marijuana into hashish. Following a preliminary hearing, Caswell was charged by information on December 15, 2003, with using a minor in the transportation, preparation or sale of marijuana, selling or giving marijuana to a minor under 14 years of age, and inducing a minor to use marijuana (Health & Saf. Code, § 11361, subd. (a); count 1), and with

giving marijuana to a minor over 14 years of age (Health & Saf. Code, § 11361, subd. (b); count 2). On September 20, 2004, pursuant to a negotiated disposition, Caswell pled guilty to count 2 and count 1 was dismissed. At sentencing on December 6, 2004, the court suspended imposition of sentence for three years and granted Caswell probation.

On September 14, 2006, Caswell's probation was summarily revoked on allegations he failed to submit to drug testing on August 15, 2006, in violation of his conditions of probation, and that he was arrested on August 26, 2006, for having sex with a 15-year-old minor. In August 2007, the report of alleged probation violations was amended to include a February 22, 2007 charge of violating the peace (playing loud music) and a failure to file written reports to probation in May, June and July 2007 or to complete 250 hours of required community service. In February 2009, the report was again amended to include a failure to file written reports to probation August 2008 through January 2009. After a contested hearing in March 2009, the court sustained the alleged violations.

In April 2009, the court imposed a middle four-year term of imprisonment for Caswell's 2003 violation of Health and Safety section 11361, subdivision (b). The court imposed a number of fines, fees and assessments, which included a \$150 laboratory analysis fine pursuant to Health and Safety Code section 11372.5 plus penalty assessments for a total of \$570, and a \$50 drug program fine pursuant to Health and Safety Code section 11372.7 plus penalty assessments for a total of \$190. The penalty assessments were imposed in part pursuant to Government Code sections 76104.6, 76104.7 ("DNA"), and 76000.5 ("EMS").

II. DISCUSSION

A. *Ex Post Facto* Violations

Caswell argues, and the People concede, that imposition of the penalty assessments pursuant to Government Code sections 76104.6, 76104.7 and 76000.5¹

¹ All statutory references are to the Government Code unless otherwise indicated.

violated the ex post facto prohibitions of the federal and state constitutions because the underlying statutes were enacted after Caswell committed his offense. We agree.

“Article I, section 10, clause 1 of the federal Constitution and article I, section 9 of the state Constitution prohibit the passage of ex post facto laws. [Citation.] California’s ex post facto law is analyzed in the same manner as the federal prohibition. [Citation.] ‘[T]he ex post facto clauses of the state and federal Constitutions are “aimed at laws that ‘retroactively alter the definition of crimes or increase the punishment for criminal acts.’ ” ’ [Citation.] . . . [Where] the question is whether [a law] increases punishment[,] . . . we consider ‘whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature’s contrary intent.’ [Citation.]” (*People v. Alford* (2007) 42 Cal.4th 749, 755.)

All three of the laws at issue went into effect after Caswell committed his 2003 crimes.² Caswell does not contend the laws changed the definition of the crime of which he was convicted. The issue before us, therefore, is whether the assessments imposed by these laws were punitive.

The Third Appellate District has held that the section 76104.6³ penalty assessment was intended by the Legislature to be punitive and thus its imposition on a defendant who

² Section 76104.6 went into effect on November 3, 2004. (*People v. Batman* (2008) 159 Cal.App.4th 587, 590 (*Batman*).) Section 76104.7 went into effect July 12, 2006. (Stats. 2006, ch. 69, §§ 18, 41 [designating law urgency statute that will take immediate effect], approved by Gov. July 12, 2006.) Section 76000.5 went into effect on January 1, 2007. (Stats. 2006, ch. 841, § 1; Cal. Const., art. IV, § 8, subd. (c)(1).)

³ Section 76104.6 provides in relevant part: “(1) Except as otherwise provided in this section, for the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, there shall be levied an additional penalty of one dollar for every ten dollars (\$10), or part of ten dollars (\$10), in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including all offenses involving a violation of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. [¶] (2) The penalty imposed by this section shall be collected together with and in the same manner as the amounts established by Section 1464 of the Penal Code. . . .” (§ 76104.6, subd. (a).)

committed his crime before section 76104.6 was enacted violated ex post facto principles. (*Batman, supra*, 159 Cal.App.4th at p. 589.) “[T]he DNA penalty assessment is explicitly designated a penalty; it is calculated in direct proportion to other fines, penalties, and forfeitures imposed; it is collected using the same provision for collecting the state penalty assessment; and it will be used primarily for future law enforcement purposes. Thus, it is a punitive ex post facto law with respect to offenses committed prior to its effective date.” (*Id.* at p. 591.) We agree with *Batman*’s analysis.

Insofar as the analysis of punitive intent is concerned, section 76104.7⁴ is virtually indistinguishable from section 76104.6. The section 76104.7 assessment “is explicitly designated a penalty” (§ 76104.7, subds. (a), (b)); “it is calculated in direct proportion to other fines, penalties, and forfeitures imposed” (§ 76104.7, subd. (a)); “it is collected using the same provision for collecting the state penalty assessment” (§ 76104.7, subd. (b) [citing Pen. Code, § 1464]); and “it will be used primarily for future law enforcement purposes” (§ 76104.7, subd. (b) [DNA Identification Fund]; Pen. Code, § 299.5). (See *Batman, supra*, 159 Cal.App.4th at p. 591.) Thus, we conclude (and the People concede) that “it is a punitive ex post facto law with respect to offenses committed prior to its effective date.” (*Ibid.*)

⁴ Section 76104.7 provides in relevant part: “(a) Except as otherwise provided in this section, in addition to the penalty levied pursuant to Section 76104.6, there shall be levied an additional state-only penalty of one dollar (\$1) for every ten dollars (\$10), or part of ten dollars (\$10), in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including all offenses involving a violation of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. [¶] (b) This additional penalty shall be collected together with and in the same manner as the amounts established by Section 1464 of the Penal Code. . . . These funds shall be deposited into the county treasury DNA Identification Fund. . . . These funds may be used to fund the operation of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, and to facilitate compliance with the requirements of subdivision (e) of Section 299.5 of the Penal Code.” (§ 76104.7, subds. (a), (b).)

Section 76000.5⁵ is indistinguishable in all aspects but one. The section 76000.5 assessment “is explicitly designated a penalty” (§ 76000.5, subd. (a)(1)); “it is calculated in direct proportion to other fines, penalties, and forfeitures imposed” (*ibid.*); and “it is collected using the same provision for collecting the state penalty assessment” (*ibid.*, citing Pen. Code, § 1464). (See *Batman*, *supra*, 159 Cal.App.4th at p. 591.) The funds raised by the assessment are used for emergency medical services rather than for law enforcement purposes. (§ 76000.5, subds. (a)(1), (d); Health & Saf. Code, § 1797.98a [Maddy Emergency Medical Services (EMS) Fund]; cf. *Batman*, at p. 591.) However, we conclude the Legislature’s intent that the assessment be punitive is clear despite the single difference, particularly in light of the Legislature’s express use of the term “penalty.” Therefore we conclude (and the People concede) that section 76000.5 too “is a punitive ex post facto law with respect to offenses committed prior to its effective date.” (*Batman*, at p. 591.)

We will order that the trial court strike these assessments from Caswell’s sentence.

B. *Retroactivity of Penal Code Section 4019*

When Caswell was sentenced on April 13, 2009, the trial court awarded 119 days of actual custody credit and 58 days of “conduct credit” for a total of 177 days of presentence custody credit. Under the then-current version of Penal Code section 4019 (hereafter, section 4019) a defendant earned two days of credit for every four days of custody unless he failed to perform assigned work or abide by the facility’s reasonable

⁵ Section 76000.5 provides in relevant part: “Except as otherwise provided elsewhere in this section, for purposes of supporting emergency medical services pursuant to Chapter 2.5 (commencing with Section 1797.98a) of Division 2.5 of the Health and Safety Code, in addition to the penalties set forth in Section 76000, the county board of supervisors may elect to levy an additional penalty in the amount of two dollars (\$2) for every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including violations of Division 9 (commencing with Section 23000) of the Business and Professions Code relating to the control of alcoholic beverages, and all offenses involving a violation of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. This penalty shall be collected together with and in the same manner as the amounts established by Section 1464 of the Penal Code.” (§ 76000.5, subd. (a)(1).)

rules and regulations. (Former § 4019, subds. (a)(4), (b), (c), (f), as amended by Stats. 1982, ch. 1234, § 7.) Effective January 2010, section 4019 provides for up to two days of credit for every *two* days of custody under the same conditions (with exceptions not relevant here). (§ 4019, subds. (a)(4), (b)(1), (c)(1), (f).)

Caswell argues he is entitled to the benefit of the current version of section 4019 because under *In re Estrada* (1965) 63 Cal.2d 740 the new law applies retroactively to all criminal sentences that were not yet final on direct review when the law went into effect. The People argue the recent amendments do not apply retroactively, citing *People v. Rodriguez* (2010) 183 Cal.App.4th 1. We recently joined several other courts of appeal in holding, contrary to the conclusion reached in *Rodriguez*, that the amendments to section 4019 do apply retroactively. (*People v. Pelayo* (May 6, 2010, A123042) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 627]; see also *People v. Brown* (2010) 182 Cal.App.4th 1354; *People v. House* (2010) 183 Cal.App.4th 1049; *People v. Landon* (2010) 183 Cal.App.4th 1096; *People v. Delgado* (2010) 184 Cal.App.4th 271; *People v. Norton* (May 5, 2010, A123659) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 612].)⁶ Consistent with *Pelayo*, we conclude here that Caswell is entitled to the increased custody credits available under section 4019 as amended in 2009.⁷ We shall direct the court to recalculate the credits under the current version of the law.

III. DISPOSITION

The judgment is reversed both as to the imposition of penalty assessments pursuant to Government Code sections 76104.6, 76104.7 and 76000.5 and as to the calculation of presentence custody credits pursuant to Penal Code section 4019. On remand, the trial court shall revise its sentencing order and the abstract of judgment to delete the just referenced assessments (totaling \$80) and to reflect that Caswell earned a

⁶ At least two other courts have agreed with *Rodriguez* in published decisions and have found section 4019 not to be retroactive. (*People v. Otubuah* (Apr. 7, 2010, E047271) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 622]; *People v. Hopkins* (May 11, 2010, H033413, H034048) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 657].)

⁷ The trial court, of course, cannot be faulted for applying the version of section 4019 in effect at the time of the April 2009 sentencing.

total of 238 days of presentence custody credits. The court shall forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

Bruiniers, J.

We concur:

Jones, P. J.

Needham, J.